In the

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1370

CALIFORNIA AND HAWAIIAN SUGAR COMPANY, AMALGAMATED SUGAR COMPANY, AMERICAN CRYSTAL SUGAR COMPANY, AMSTAR CORPORATION, THE GREAT WESTERN SUGAR COMPANY, HOLLY SUGAR CORPORATION, UNION SUGAR DIVISION, CONSOLIDATED FOODS CORPORATION, U AND I INCORPORATED, and CALIFORNIA BEET GROWERS ASSOCIATION, LTD.,

Petitioners,

v.

STATE OF CALIFORNIA and MADELYNE BRINKER,

Respondents.

Respondent Madelyne Brinker's Brief in Opposition to Petition for a Writ of Certiorari

LOVITT & HANNAN, INC.
Agriculture Building
Embarcadero at Mission
San Francisco, CA 94105
Telephone: (415) 362-8769

RONALD LOVITT
HENRY I. BORNSTEIN
Attorneys for Respondent Madelyne Brinker

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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QUESTION PRESENTED

In spite of petitioners' attempt to unduly complicate the issues at hand through the injection of immaterial matters, the single question presented can be simply stated:

Was not respondent's lawsuit improvidently removed to the federal district court from the California Superior Court

when respondent's cause of action was totally founded upon California law and not upon federal law, and when the federal law upon which such removal was allegedly based does not provide a basis for the relief that respondent seeks?

STATUTES INVOLVED

As well as the statutes set forth in the Petition at pages 4 - 6, this case also involves Calif. Bus. & Prof. Code § 16760, which provides in pertinent part:

> The Attorney General may bring a civil action in the name of the people of the State of California, as parens patriae on behalf of natural persons residing in the state, in the superior court of any county which has jurisdiction of a defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of this chapter. The court shall exclude from the amount of monetary relief awarded in such action any amount of monetary relief (A) which duplicates amounts which have been awarded for the same injury or (B) which is properly allocable to * * * (ii) any business entity.

STATEMENT OF THE CASE

Petitioners' statement of the case, although substantially correct, contains much that is completely irrelevant to the question to be decided, and appears to be an attempt to convince the Court that the question presented is of greater import than appears from an impartial reading of the decision upon which they seek review.

Respondent Brinker filed her complaint in the Superior Court of the State of California on December 16, 1975, alleging unfair trade practices in restraint of trade in violation of section 16600 *et seq.* of the California Business and Professions Code, commonly referred to as the Cartwright Act. The complaint alleged that the defendant sugar companies conspired to fix and stabilize the retail price of refined sugar at an unlawfully high level.

On March 3, 1976, Respondent Brinker noticed a motion to have the suit certified as a class action pursuant to section 382 of the California Code of Civil Procedure, seeking to represent all individuals who during the relevant period purchased refined sugar at retail within the state of California in its original bulk package form, from retailers which sold sugar supplied by one or more of the defendants.

On March 17, 1976, before the motion on class certification could be heard by the California court, defendants removed the action to the United States District Court for the Northern District of California pursuant to 28 U.S.C. § 1441. Although Mrs. Brinker's cause of action was based entirely upon state law, defendants based their removal upon the allegation that Mrs. Brinker's complaint was founded on a claim or right arising under the laws of the United States, specifically the Sherman and Clayton Acts (15 U.S.C. §§ 1, 15).[1]

On March 26, 1976, Respondent Brinker moved the federal district court pursuant to 28 U.S.C. § 1447(c) for an order remanding her cause of action to the California Superior Court on the grounds that the case was removed improvidently and without proper jurisdiction. Specifically, remand was urged on the grounds that Respondent's suit arose under a right created by a statute of the State of California, and *not* under a right created by the laws of the United States.

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1. Initially, defendants advanced as a further ground that respondent's one count complaint was removable pursuant to 28 U.S.C. § 1441(c), as containing a "separate and independent claim or cause of action" which would have been removable if sued upon alone. This contention was abandoned in the Court of Appeal.

On July 23, 1976, the district court issued its "Order Re: Memorandum Decision on Plaintiffs' Motion to Remand" in which it denied this motion. This ruling was specifically premised upon the finding that respondent's state law complaint presented on its face allegations which would allow a damage recovery under the Sherman Act. Petition, Appendix C, p. 12, n.2.

The Court of Appeals reversed the district court and ordered a remand to the state court, finding that respondent's claim arose under state law and not federal law. Petition, Appendix A, p. 7. As petitioners point out, this finding was in part based upon this Court's opinion in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), which held that indirect purchasers such as respondent were not persons injured in their business or property as that term is used in section 4 of the Clayton Act.[2] *Illinois Brick*, however, did not form the entire basis for the opinion of the Court of Appeals, which can only be reversed by doing grave harm to the delicate balance between federal and state legislative powers.

REASONS FOR DENYING THE WRIT

An analysis of the Petition reveals that in order to attack the Court of Appeals decision below, petitioners are forced to ask this Court to both completely disregard age-old principles of federal and state comity, and to enlarge the jurisdiction of the federal courts beyond anything heretofore imagined. The petitioners, in effect, are asking this Court to rule:

> (1) that the removal jurisdiction of the federal courts be expanded to allow removal of state court causes of action, even if they are totally based upon state-created rights, and even if there is no federal right that provides the state court plaintiff with a claim for relief;
> and
> (2) that contrary to all past decisional law, the Sherman Act preempts every state attempt to regulate business and competition to which the broad jurisdiction of the Act might arguably apply.

2. Contrary to petitioners' assertion (Petition, p. 11), this point was argued by respondent's counsel in the Court of Appeals.

The correctness of the Court of Appeals' decision is demonstrated by the lengths to which petitioners are forced to go in asking this Court to review that decision.

I. Respondent's Cause of Action Is Totally Based Upon State Law and Cannot Arise Under Federal Law

Petitioners' entire argument that respondent's cause of action arose out of a federal right or law consists of the assertions that the complaint alleges "a set of facts constituting a violation of the Sherman Act," and that respondent cannot "prevent removal of a case that states a cause of action under a federal statute by seeking solely a state remedy." Petition, pp. 15-16. This not only misstates clearly established law, but it also inconsistent with other arguments that petitioners find themselves forced to make.

It has been well established for over 50 years that even though the operative facts of plaintiff's case provide a choice between federal or state causes of action, plaintiff may choose not to assert a federal right and may rely instead solely on state law. *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913). Questions concerning federal jurisdiction and the ouster of the jurisdiction of state courts are determined by "the particular claims a suitor makes in a state court—on how he casts his action." *Pan Am. Petro. v. Superior Court*, 366 U.S. 656, 662 (1961).

It is therefore immaterial that the facts alleged in Respondent Brinker's complaint *may have supported* a claim under the Sherman Act.[3] "If a plaintiff decides not to involve a federal right, his claim belongs in a state court." *Pan Am. Petro. Corp. v. Superior Court, supra,* 366 U.S. at 663. Only if a right created by federal law is an essential element of plaintiff's cause of action does a suit "arise" under the laws of the United States for purposes of removal. *Phillips Petroleum Company v. Texaco, Inc.,* 415 U.S. 125 (1974); *Gully v. First Nat'l Bank,* 299 U.S. 109 (1936).

Moreover, the rule that petitioners suggest this Court adopt is not only unsupported in law, it would wreak havoc with the dual system of federal and state courts in this country. "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." *Healy v. Ratta,* 292 U.S. 263, 270 (1934). Petitioners seem to assert that no matter how well-grounded a plaintiff's suit is in state-created law, it is removable as long as some federal statute exists which also happens to offer a cause of action. If this were the law, the jurisdiction of the federal courts over lawsuits based upon a state's common law or statutory rights would be limited only by a defendant's resourcefulness in searching through the myriad of federal statutes until he found one which happened to offer an alternative route to the courthouse. This was not the intent of Congress in passing the removal statutes. *See Shamrock Oil & Gas Corp. v. Sheets,* 313 U.S. 100, 108-109 (1941).

3. As discussed below, petitioners elsewhere admit that no such claim can be supported here. *See* Petition, p. 22.

It is not enough that respondent has alleged facts that would have sustained a claim under some federal law, unmentioned in her complaint. Unless that law is a *necessary and essential prerequisite* to her recovery, there can be no removal. The California Cartwright Act provides the only law that is necessary to respondent's cause of action, and this Court's analysis need go no further in finding that her claim does not arise under the Sherman Act.

Remarkably, however, even this drastic interference with the rights of the states to legislate in the interests of their citizens is not enough to support petitioners' position, and they are compelled to *further* assert that a complaint cast pursuant to a state law can be removed to federal court, not only when no federal right is essential to the plaintiff's claim, but even if federal law *does not even provide a cause of action* under the facts alleged.

Petitioners are forced into this position by this Court's decision in *Illinois Brick,* which held that indirect purchasers of price-fixed items were not "persons injured in their business or property" who could recover damages under the Sherman Act. Therefore, *Illinois Brick* implies not only that there is no federal right essential to respondent's cause of action, but moreover, that respondent's complaint does not even give rise to a federal right at all. There is simply no federal right upon which respondent's state law complaint could be based.

Petitioners argue that *Illinois Brick* only held that there is no relief under the Sherman Act, and not that there is no subject-matter jurisdiction, and that therefore, *Illinois Brick* is irrelevant to questions corncerning removal. Petition, pp. 22-23.

The issue on removal is indeed subject-matter jurisdiction. *Thermtron Products, Inc. v. Hermansdorfer,* 423 U.S.

336 (1976). It is not surprising, however, that petitioners never even bother to point out that the standard *for determining* this subject-matter jurisdiction on removal is that a right created by federal law must be an *essential element* of the plaintiff's cause of action. *Gully v. First National Bank, supra.* Because of this standard, the *Illinois Brick* determination that respondent cannot recover under federal law *is* a determination that her complaint can be based on no federal right, essential or otherwise, and that there was no proper removal jurisdiction over this case. Petitioners' argument simply begs the question.

If petitioners' position were to be seriously considered, it would mean a devastating intrusion of the federal courts into state matters. A defendant would not only be allowed to recast a state court complaint in terms of any federal statute which also provided relief, and thus obtain a removal of an entirely state-controlled matter into federal court; he would also be able to do so even if there were no federal statute that provided relief, and thus obtain a dismissal of the action. If this were the law, there would be no limit to federal removal jurisdiction.

II. The Federal Antitrust Laws Do Not Preempt Parallel Efforts By the States to Curb Anticompetitive Conduct

Faced with the extreme nature of the position to which they are forced to retreat, petitioners come at last to the final solution to their dilemma: that, in effect, all state antitrust laws are preempted by federal law in matters of interstate commerce.[4]

4. This provides an explanation for the petitioners' frequent citations to cases arising under the Labor Management Relations Act of 1947, which *does* preempt state efforts at regulation of labor matters. *See, e.g.,* cases cited at pages 16-17. These cases are irrelevant to the present issue.

Initially, preemption of a state statute by federal law is not a ground for removal, but is instead a constitutional defense to be asserted in the state court. *State of Washington v. American League of Professional Baseball Clubs,* 460 F.2d 654, 660 (9th Cir. 1972). The existence of an overriding federal statute "'. . . would only demonstrate that the suit could not be maintained at all, and not that the cause of action arose under the Constitution or laws of the United States.' [Citation omitted]" *Williams v. First National Bank,* 216 U.S. 589, 594 (1910).

In any case, the California antitrust laws are not preempted by federal legislation. Despite the district court's statement in its Order Re: Memorandum Decision that "[t]he enactment of state legislation identical or comparable to the Sherman Act and other federal Acts has been of relatively recent origin" (Petition, Appendix C., p. 17), this is simply not the case. The California Cartwright Act was passed in 1907, only a short time after the Sherman Act. Calif. Stats. 1907, c. 530, p. 984. Indeed, at the time of the passage of the Sherman Act, 21 states already had statutes proscribing "combinations in restraint of trade." *See* Mosk, State Antitrust Enforcement, 21 A.B.A.J. 358 (1962); Note, The Commerce Clause and State Antitrust Enforcement, 61 Colum. L. Rev. 1469 (1961).

The intent of Congress in passing the Sherman Act was clearly *not* to preempt parallel state efforts to regulate trade. In the words of Senator Sherman (21 Cong. Rec. 2457 (1890)):

> This bill . . . has for its . . . object to invoke the aid of the courts of the United States to deal with the combinations . . . when they affect injuriously our foreign and interstate commerce . . . and in this way to supplement the enforcement of the established rules of the common and statute laws by the several states in deal-

> ing with combinations that affect injuriously the industrial liberty of the citizens of those states. It is to arm the federal courts within the limit of their constitutional power that they may cooperate with the state courts in checking, curbing and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States . . . .

The Supreme Court long ago established that Congress has not preempted state antitrust laws, even in the area of interstate commerce. *Standard Oil Co. v. Tennessee,* 217 U.S. 413 (1910). This doctrine has been consistently followed by other courts. *See, e.g., Mathews Conveyor Co. v. Palmer-Bee,* 135 F.2d 73, 82 (6th Cir. 1943); *R.E. Spriggs Co. v. Adolph Coors Co.,* 37 Cal.App.3d 653, 112 Cal.Rptr. 585 (1974); *State of Texas v. S.E. Tex. Chap. Nat. Elec. Con. Assn.,* 358 S.W.2d 711 (Tex. Cir. App. 1962), *cert. denied,* 372 U.S. 969 (1963); *State of Wisconsin v. Allied Chemical & Dye Corp.,* 9 Wis.2d 290, 101 N.W.2d 133 (1960); *Commonwealth of Massachusetts v. McHugh,* 93 N.E.2d 751 (1950); *Leader Theatre Corp. v. Randforce Amusement Corp.,* 58 N.Y.S.2d 304 (1945).

Although faced with this case law, petitioners still argue that "the Sherman Act is the paramount law of the land and that conflicting state laws cannot be applied to interstate transactions." Petition, p. 12, n. 6. The conflict claimed is with "the policy of the federal antitrust laws as expressed in *Illinois Brick*" that the Sherman Act be interpreted to avoid duplicative recoveries. Petition, p. 19.

This policy is *not* in conflict with California's Cartwright Act. As noted in both the opinion of the Court of Appeals (Petition, Appendix B, p. 9), and in the Petition itself (at p. 19, n. 13), California has recently passed section 16760

of the California Business and Professions Code, expressing an interest to avoid duplicative recoveries in suits by indirect purchasers, at least in *parens patriae* cases.

As petitioners point out, whether this is applicable in private suits is a matter "that will presumably be decided by the courts of California." Petition, p. 19, n. 13. Petitioners are asking this court to invalidate a state statute before the state courts have had a chance to interpret this statute so as to prevent a conflict. Since such a determination will be binding on this court (*Quong Ham Wah Co. v. Indust. Acc. Comm.,* 255 U.S. 445 (1921)), the issue of any such conflict is not yet ripe for decision. Furthermore, that is no reason to think that the California courts will countenance any such duplicative recovery.

It is important to note that contrary to petitioner's assertions (Petition, pp. 21-22), this is *not* a case which raises the spector of corporate confusion concerning what conduct is legal and what conduct is illegal. The only *possible* conflict merely concerns which parties may sue—price-fixing is clearly illegal under both state and federal law.[5]

This Court has made it clear on numerous occasions that in the field of trade regulation ". . . as in other areas of coincident federal and state regulation, the 'teaching of this court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.'" *Exxon Corp. v. Governor of Maryland,* ....U.S....., 98 S.Ct. 2207, 2216 (1978). In the words of this Court, "[t]his sort of hypothetical conflict is not sufficient to warrant preemption." *Exxon Corp., supra,* 98 S.Ct. at 2216-17.

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5. Even if this were a case involving a state statute which required a different standard of competitive conduct than did federal law, this Court has just recently reconfirmed the right of a state to do so, even if the state law makes illegal what federal law condones. *Exxon Corp. v. Governor of Maryland,* ..... U.S. ....., 98 S.Ct. 2207, 2217-18 (1978).

III. The Fact That This Case Involves Multidistrict Litigation Has No Bearing on the Jurisdiction of the Federal Courts.

Petitioners seem to imply throughout their petition that because this case involves multidistrict litigation pursuant to 28 U.S.C. § 1407, different jurisdictional rules should apply than would otherwise. This was one basis for the district court's refusal to remand. *See* Petition, Appendix C, pp. 16-17. The history of the adoption of § 1407 shows clearly that the statute was not intended to expand in any way the jurisdiction of the federal courts.

The purpose of Congress in enacting § 1407 was described in the House Report on Senate Bill 159 (reproduced in 2 U.S. Code & Cong. & Admin. News, 90th Cong. 2nd Sess., at 1898) (emphasis added):

> The bill adds a new section 1407 to title 28, United States Code, to provide judicial machinery *to transfer, for coordinated or consolidated pretrial proceedings, civil actions,* having one or more common questions of fact, *pending in different judicial districts.*

In the words of Judge William H. Becker of the Panel:

> The purpose of section 1407 as shown independently by its clear language, corroborated by the legislative history, including the reports of the Congressional Committees and of the Judicial Conference, and by testimony before Congress of its authors, makes it clear that *its remedial aim is to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions. (In Re Plumbing Fixture Cases,* 298 F.Supp. 484, 490-92, 495 (Jud. Pan. on Mul. Dist. Lit., 1968)) (Emphasis added, footnote deleted.)

Section 1407 was intended, therefore, only as a procedure for effecting more efficient pretrial proceedings in related

cases which are *already pending* in the federal district courts. It was not intended to alter the basic jurisdiction of the federal courts.

The Report of the Coordinating Committee on Multiple Litigation Recommending New Section 1407 (reproduced as an Appendix to *In Re Plumbing Fixture Cases, supra*) clearly shows that the intent was *not to alter* the rules pertaining to the jurisdiction of the federal courts:

> The Co-Ordinating Committee considered whether the necessary procedural changes could be accomplished under existing rule-making authority. Study led to the conclusion that venue, historically a matter of legislative concern, would be affected by any appropriate solution of the problems. An earlier draft of a similar proposed statute would have provided the necessary statutory authority but would have required substantial implementation by the panel under specifically delegated flexible rule-making authority. After considering the comments received on an earlier draft, *the Committee has concluded that its objectives can be achieved by the more limited and specific statute now proposed which authorizes only implementing rules not inconsistent with any Act of Congress or the Federal Rules of Civil Procedure. (In Re Plumbing Fixture Cases, supra,* 298 F.Supp. at 498.) (Emphasis added.)

In sum, it is evident from the legislative history of section 1407, that the section was intended to do no more than to provide a procedure for the consolidation of federal cases for pretrial purposes. To say that this could affect the jurisdiction of the federal courts is to put the proverbial cart before the horse. If the federal courts have no jurisdiction over a case from the onset, then a rule concerning only the consolidation of federal cases for pretrial purposes certainly cannot change this fact. The Court of Ap-

peals for the Sixth Circuit has indeed so ruled. *Bancohio Corp. v. Fox,* 516 F.2d 29, 32 (6th Cir. 1975).

This Court has repeatedly cautioned that the removal jurisdiction of the federal courts must be strictly construed to carry out the Congressional intent to restrict such jurisdiction. *See, e.g., Shamrock Oil & Gas Corporation v. Sheets,* 313 U.S. 100, 109-10 (1941). As this Court has explained:

> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction over the suit . . . would . . . work a wrongful extension of federal jurisdiction and give district courts power the Congress had denied them. *American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951).

CONCLUSION

For the above reasons, the Petition should be denied.

Dated, San Francisco, California,

April 2, 1979.

Respectfully submitted,

RONALD LOVITT
HENRY I. BORNSTEIN
LOVITT & HANNAN, INC.
Counsel for Respondent
Madelyne Brinker